PUBLIC PROSECUTOR

v.

WONG AH NGAN

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CRIMINAL TRIAL NO. 11 OF 1984]
21 JULY 1986

CRIMINAL LAW AND PROCEDURE: *Dangerous Drugs Act 1952 - Section 39B - Trafficking - 20.43 grammes of heroin discovered in room rented by accused - Defences - Whether sufficient evidence beyond reasonable doubt.*

The accused rented a room at No. 5-N, 3rd Floor, Taman National, Jalan Gopeng, Ipoh. On 23 March 1984 at about 10.00 a.m. the police raided the premises. A Chinese youth opened the main door. The police then knocked at the door of the second room. A male Chinese (the accused), in his underwear, opened the door. The police searched the room and found a big plastic bag at the edge of a mattress next to a wallet. This big plastic bag, *inter alia*, contained dangerous drugs. The accused was arrested and charged under s. 39B of the Dangerous Drugs Act 1952.

The accused put up a number of defences:

(i) he was not aware of the drugs in his room;
(ii) the room was not locked when the police party came in;
(iii) the owner of the house had access to the room;
(iv) other occupants of the premises had access to the room; and
(v) the keys discovered by the police were on the TV set in the hall and not behind the door of his room.

Held:

[1] The accused should be aware of the incriminating exhibits in his room because the room was small and there was no furniture except the mattress and pillow. Furthermore, the fact that the accused returned to the room at 1.00 a. m. and was there until 10.00 a.m. made it quite impossible for the accused not to have notice of the exhibits.

[2] The defence had not raised a reasonable doubt for the accused to be acquitted.

[Accused sentenced to death.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39B

For the public prosecutor - Sarala Pillai, DPP
For the accused - Chin Yoong Fee of M/s. K.C. Lai & Co.

JUDGMENT

Peh Swee Chin J:

This case is yet another case of drug trafficking under s. 39B of the Dangerous Drugs Act 1952 which culminated in a conviction for which I had to pass the mandatory sentence of the death by hanging. I now give my grounds of judgment. First I will set out the material parts of the evidence.

On 23 March 1984, Insp. Mudasir (PW2) received instructions to raid premises No.5-N, 3rd Floor, Taman National, Jalan Gopeng, Ipoh. He then briefed D/Cpl Fong, (PW9), D/Cpl Lim, DPC Yunan Saidin, (PW6) and DPC Sariff about the raid in connection with the said raid. On

arriving at the premises which were on the 3rd floor of a building (a block of flats), Insp. Mudasir went up with D/Cpl Fong, DPC Saidin and DPC Sariff by the staircase while the others were posted on the ground to prevent any escape. Insp. Mudasir then knocked on the door of the premises, (flat or apartment) 4 times, and it was opened by a male Chinese viz. Fong Choon Weng (PW7). Insp. Mudasir then instructed the male Chinese to sit in the hall after showing his police authority card. He then headed for a room in the middle, or the 2nd room, and found this room closed. He knocked on its door several times, it was opened by another male Chinese to whom Insp. Mudasir again showed his authority card and who, in his underwear, was the only person found by Insp. Mudasir in the room. Insp. Mudasir found, on entering the room, another door on his right-hand side and this other door was latched from inside the room. The window of the room was also closed. Insp. Mudasir instructed DPC Saidin to guard this man while he and D/Cpl Fong searched the room in the presence of the accused and other two police personnel. He found a big plastic bag at the edge of a mattress next to a wallet. This big plastic bag had the name of "Beauty Crescendo" on it. Inside this big plastic bag was another smaller plastic bag also with the name of "Beauty Crescendo" printed on it. Inside this smaller plastic bag was another package wrapped in "Star" newspaper dated 7 March 1984. Inside this newspaper package, were found (a) 4 plastic packets containing granular substance, suspected to be drug; (b) 6 other smaller plastic packets containing a powdery substance suspected to be drug also; (c) an empty plastic packet, (d) another plastic packet which had been cut and which contained traces of suspected drug; (e) two long small empty plastic packets tied with a rubber band; (f) two pieces of underwear; (g) a bottle of hair liquid; a bottle of freshner both of "Sheiseido" brand; and a key. Apart from the big plastic bag with all its contents mentioned above, Insp. Mudasir also found on the floor beside the right wall, a match box inside which was another small plastic packet containing powdery substance suspected to be drug. Insp. Mudasir instructed DPC Saidin to handcuff the male Chinese who was identified as the accused in this case. He also found under a pillow on the mattress, a wallet or purse and inside it, he found a printed form being Form NR7A in connection with the loss of identity card and on the form the name of the accused appeared. He also found cash of RM461 in the wallet.

Insp. Mudasir then opened the second door, he found on entering the room, and it opened to a bath room in which there was another door which opened to the hall outside. The other door of the bathroom had latches on both sides.

He saw the mattress on the floor with its bedsheet, a pillow with its cover, and a pair of pants. He also found hanging behind the door through which Insp. Mudasir first entered, two shirts, and a pair of trousers. The time from entering the room till he left it was about 45 minutes.

He then took the accused and the various exhibits described above to the police station where he marked the exhibits while DPC Saidin who was guarding the accused and the accused were present. He stated also he had seized a bunch of 4 keys. He then lodged a report and then issued a search list (P34) which he and the accused both signed. The bunch of keys (P24)was attached to the key-hole of the door from inside the room.

In cross-examination, Insp. Mudasir said he did not know which of the two T shirts was worn by the accused or whether any of these T shirts was taken from the accused in the lock-up. He agreed that the bunch of 4 keys was not listed in the search list. He denied he had not knocked the door of the room and he maintained that it was the accused who unlocked the door. He denied that the bunch of 4 keys was found instead in the hall from the top of what appeared to the Court to be a large TV set as shown in one of the photos. He maintained that the bunch of keys was taken from the key-hole in question. He denied it

was D/Cpl Fong who led the police party to the flat. He did not know whether D/Cpl Fong was known to the house owner prior to the raid. In re-examination he said that the reason why the bunch of 4 keys was not listed in the search list was because the bunch of keys was not recovered from the person of the accused.

Insp. Raja Zahudeen, (PW1), was instructed to investigate into the report lodged by Insp. Mudasir who handed over to him the accused and the exhibits mentioned above on 23 March 1984. He kept the exhibits in his steel cabinet before he sent them to the Chemistry Department which he did subsequently. On 24 March 1984 he went to the premises in question with Insp. Mudasir, the accused, DPC Tengku Azman. He used the key seized by Insp. Mudasir to open the front door of the house (i.e. the flat or apartment). He again used a key seized by Insp. Mudasir to open the second room. Inside the room when the accused was arrested, he saw a mattress, a pillow, a T shirt, a towel and one table fan. He then drew a sketch plan and instructed DPC Tengku Azman to take photographs of the room and hall. He personally sent the exhibits to the Chemistry Department and obtained a receipt with the laboratory No. IP 2036/84 on it. He later went personally to get back the exhibits from the chemist and the chemist's report which was served by Sergeant Chiang Bee. He found the house owner to be one Liew Ah Thai (f)(PW5). The male Chinese who opened the door of the house, (and not the room) was Fong Choon Weng (PW7), the son of Liew Ah Thai (f). The front room was rented out to a woman called "Ah Soh". There was another small girl called Tang Tooi Yee. All except the said Ah Soh and Tang Tooi Yee were identified by Insp. Raja Zahudeen.

In cross-examination Insp. Raja Zahudeen said that the single key was already in the big plastic bag when the accused was arrested. When he drew up the charge sheet, he stated that there were approximately 55 grammes of heroin, because when he received all the exhibits or packets, he weighed all the packets and found the weight to be so. He said he put exhibits in one and the same steel cabinet, including exhibits from other cases. He put all exhibits he was handed in this case (except the match box) into one big envelope marked by him with the letter and figure "Z1" and put the match box togehter with plastic packet inside the match box into another envelope marked with the letter and figure "Z2". On 23 & 24 March 1984, he only investigated into this instant case and no other case. He denied there could be any mix-up of exhibits.

Sergeant Chiang Bee (PW3) confirmed he served the chemist's report on the accused at Taiping prison and obtained the accused's acknowledgement. DPC Tengku Azman produced the negatives of the photos he took.

Liew Ah Thai (f), (PW5), confirmed that the flat was on the 3rd floor in a block of flats. She rented one of the three rooms to the accused who was identified, and to whom she handed a key to the room rented by him and the keys of the door to the flat, all together three keys. She said he had no other key. Her working hours in a gambling saloon were between 8.00 a.m. to 9.00 p.m. 7 days a week. There was another family consisting of a mother, her son and daughter staying in the first room rented to such family. They left after the arrest of the accused. The mother of the family told her she worked at a bar and the two children of this tenant were 10 years and 8years old respectively. "The bar girl" left the place about 2 months after the arrest of the accused. She said in cross-examination that she knew D/Cpl Fong who had been to her flat before. After the accused's arrest she did not know whether D/Cpl Fong had come to the flat. Her son, Fong Choon Weng, was working as a logger in Sabah and during the time the accused was arrested, he had come back from Sabah for the Chinese New Year. The "bar girl" left the flat because she was in arrear of rent.

DPC Saidin and D/Cpl Fong largely corroborated the evidence of Insp. Mudasir.

Fong Choon Weng, (PW7), the son of the chief tenant of the flat, said on the day of accused's arrest, he opened the door of flat to Insp. Mudasir who asked him to squat in the hall. The accused stayed there for three weeks during which he had entered the accused's room only once for taking away his personal belongings before the accused moved into it. Prior to the arrest, the accused had stayed there for three weeks during which had entered the accused's room only once for taking a table fan to accused's room. He spent most of his time in the flat.

He denied in cross-examination that the accused moved into the flat because he was his friend. The accused knew his mother because he lent her money for bail. He denied that the arrangement between him and the accused was that he could use the accused's room for sleeping in there. He then agreed that he had entered accused's room more than once. Ah Soh, the tenant of the first room was in during the day but he did not know whether she was in on the day of the accused's arrest. He agreed that the object on the top of the large TV set in the hall was a bunch of keys and that occupants of the flat found it convenient to dump the keys there. He said he had entered the accused's room twice.

Insp. Raja Zahudeen was recalled to say that he did not take the bunch of 4 keys from the top of the TV set in the hall. D/Cpl Fong denied he had been to the flat before the accused's arrest though he had met her. He denied that the accused had stood as a bailor for Fong Choon Weng. He said he did not know about the case in the Magistrate's Court in which the said Fong Choon Weng was charged. He said it was not possible for him to know all the drug cases in Ipoh's lower Courts.

The prosecution then called ASP Yeow (PW10) to adduce evidence about a cautioned statement for the purpose of impeaching the accused's credit and for proving the contents. In that cautioned statement, the accused said he did not wish to give a cautioned statement and instead would give a statement in Court later. The Court disallowed later on application by the prosecution to impeach the credit of the accused as the Court found no serious discrepancy.

At the close of the prosecution case, learned defence Counsel submitted that there was no case to answer. I will set out briefly the gist of his submissions, and the reply of the learned Deputy Public Prosecutor and my views thereon; as far as possible, point by point.

He submitted that the drug tendered in evidence was not that seized by the police. In the charge sheet originally framed, the weight was stated to be 55 grammes but it was reduced to 20.43 grammes later. He submitted that Insp. Raja Zahudeen just weighed the packets of heroin.

Learned Deputy, in reply stated that the chemist's report was received at a very much later date while the accused was arrested early. The chemist was offered to the defence as a witness, if there was any doubt.

The discrepancy in weight was, in my view, explained for PW1 weighed the packets containing the suspected drug while the chemist weighed the amount of actual suspected drug. The complaint of Counsel had no substance.

Secondly, learned defence Counsel said there were glaring loopholes to the effect that the drug photographed was not the same drug put in the envelope.

The learned Deputy had not replied on this and this Court was in no position to appreciate Counsel's contention which appears to rest on the exhibits being found to be neatly arranged as shown in the photos when they were photographed. The contention had no merit.

Thirdly, learned defence Counsel submitted that in the flat, there were Liew Ah Thai, (chief tenant), her son, Fong Choon Weng, the tenant in the first room and her two minor children. No question, he argued, was put to Liew Ah Thai or Fong Choon Weng as to whether the exhibits had belonged to them. Why, he argued, was not the tenant in the front room (Ah Soh) called as a witness?

In reply, the learned Deputy, said Fong Choon Weng was called. He was in the hall. There was no other person in the room where the accused was found. All the keys had been given by the said Liew Ah Thai, the chief tenant to the accused.

In my view, learned defence Counsel's contention would have relevance or merit if the suspected drug was found in the hall. Failure to put that question as to whether the suspected drug had belonged to Fong Choon Weng or his mother to them in my view was immaterial neither did it matter that the tenant of the front room had not been called as the suspected drug was found not in the hall, but in accused's room.

Fourthly, the suspected drug was not recovered from the body of the accused, and the evidence was therefore circumstantial evidence. Further the bunch of keys was not in the search list.

Learned Deputy in reply, submitted to the effect that accused was the sole occupant of the room in question and there was no arrangement for Wong Choon Weng to use the room in question. The clothes of the accused were found in the room also.

In my view, being the sole occupant, of the room in which the suspected drug was found, Counsel's contention would appear to be splitting hairs. The fact that the bunch of keys was not listed in the search list may suggest that keys had not been recovered at the time of the making of the search list or that other persons could have access to such keys, but there was the evidence that Insp. Mudasir had found the room in question locked and had knocked on the door and found the accused to unlocking it and opening it. His evidence was supported by two members of the police party who were together with him.

I found there was a *prima facie* case for the accused to answer and he was called to enter on his defence. He elected to give evidence in the box.

The accused in his evidence, said he was working at a canteen on a construction site of a housing scheme. When in town, he found it difficult to get transport back to his canteen. He told this to Fong Choon Weng whom he knew and the latter suggested that the former rented a room in flat No. 5-N, Taman National. The accused met the mother of Fong and it was agreed. Before renting the room, Fong was arrested by the police, and the accused provided a sum of RM500 for the cash bail for Fong. The accused said he did not intend to stay in the room permanently, but merely to pass the night in the room when he could not get transport to go back to the canteen. He said he had brought 2 pillows to the room and not one pillow as stated by the police. His room was not locked all the time, because he had nothing inside the room and he knew all occupiers of the flat. When he returned to the flat, he would put the bunch of keys on top of the TV set. The tenant of the front room had no attached bathroom which was attached to his room and that was a common bathroom. He did not habitually latch his side of the connecting door between his room and the common bathroom. During his absence, the tenant of the front room and Fong's mother used to clean

his room. People sometimes went through his room to go to the common or attached bathroom. By 23 March 1984, he had rented in that room for only 9 days and for 2 out of such 9 days, he did not stay there. In the early hours of the morning on 23 March 1984, at about 1.00 a.m. he returned to his room at the flat. He did not notice P29 - the big plastic bag (which contained the drug and packets etc), and the match box (P21), (which contained a plastic packet which in turn contained the drug), and they did not belong to him. At the time of the arrest, the bunch of keys was on the TV set in the hall. He had not gone shopping at Crescendo Beauty and he did he not use hair oil or lotion of the Sheiseido brand.

In cross-examination, he said that it was difficult to get transport to go back to Jalan Pengkalan (near Lahat) where the canteen was. He agreed there was no arrangement for Fong to share the room in question with him. He said he borrowed the sum of RM500 from a friend in respect of the cash bail. He said on the morning of his arrest, his room was not locked. His room was not locked whenever he went out of his room. The exhibits did not belong to him. He signed the search list because he was asked to sign it. The things in the search list were recovered from the room. He did not open the door to the police because the door was not locked. He did not pay attention to the police taking possession of the bunch of keys from the top of TV set. He said Fong slept in his room every night. He came to know of the plastic bag (with the exhibits inside) after the police entered his room. The exhibits were not by his bed side. Fong brought his friends to stay in his room. When he returned that early morning, he never noticed the big plastic bag and the match box.

He told the police officer who recorded the cautioned statement from him that he wanted to give a statement in Court only. The cautioned statement was, after a trial within a trial, admitted and it supported the accused's evidence that he had told the recording officer that he had wanted to give a statement in Court only. The Court was satisfied beyond a reasonable doubt that there was neither threat, nor promise nor inducement of any kind before and at the time of the making of the cautioned statement. The cautioned statement confirmed in fact what the accused had said that he wanted to give a statement in Court and not to the police.

In his final submission, learned defence Counsel submitted first that the charge as drawn did not expressly state that the accused had no lawful authority or permission to possess the drug. The learned Deputy did not reply specifically to it.

In my view, it is elementary that a charge should be drawn up so as to show what the prosecution would have to prove and to let the accused know what is charged against him. Here the accused was charged expressly with trafficking in a dangerous drug, the accused could not surely have been left in the slightest doubt that any legal authority for such trafficking must be regarded by the prosecution as absent. A charge of stealing would equally and implicitly inform an accused that that the owner of the subject matter of theft has not given his consent. Technically and moreover, since such lawful authority or permission would be a matter within the knowledge of an accused, there is no necessity for the prosecution consequently to state it in a charge when drawing up the same. The contention of Counsel was therefore devoid of any substance.

On the evidence, learned defence Counsel submitted that the defence had raised a reasonable doubt as to who was the habitual user of the room in question other than the accused; about the accessibility of the room to other persons; about the bunch of keys not being in the possession of the accused; about the chief tenant *viz.* Liew Ah Thai and her son viz. Fong Choon Weng being interested parties, about the bottles lying in the big plastic bag not being dusted for finger prints; and about Fong being charged with possession of drug.

The learned Deputy submitted that all the exhibits were recovered in the room, and the accused had signed the search list. Personal belongings of the accused, including his wallet and identity card (or rather the substitute of identity card in the shape of a printed form pending issue of replacement identity card) were found. The room was rented to the accused. The room had a lock. All the keys were given to the accused. Fong was never questioned by the accused as to his friends being brought to the accused's room neither was Fong questioned by the accused about Fong's drug case.

After considering the defence evidence, it had not cast a reasonable doubt on the prosecution case. In particular, I found it hard to believe that the accused had not noticed the presence of the big plastic bag which contained the incriminating exhibits in a small room bare of all furniture except the mattress and pillow etc. He was then in the room for about 10 hours. No personal belongings of Fong found in accused's room though the accused hinted very broadly but never at any time said directly that the drug belonged to Fong who himself was supposed to have been involved in a drug case. Why did the accused fail to confront Fong with a suggestion that the drug belonged to Fong? Could it be that his conscience had prevented him from doing so when he knew that it belonged to himself? I was inclined to believe so, without hesitation. I did not doubt that when the police knocked on the door of his room, his room was in fact locked. There could not have existed any familiarity among the flat dwellers there of such a kind as for the accused to leave his room unlocked when he slept. I had however some doubt about the bunch of keys not listed in the search list.

I could not accept Insp. Mudasir's explanation that the failure to mention the bunch of keys in the search list was due to the said bunch of keys not having been recovered from the person of the accused as distinct from the room of the accused. On the point of prosecution case that the bunch of keys was recovered from the key-hole of the accused's room, the defence, in my view had cast a reasonable doubt on it. I would even go even so far as to say that the bunch of keys could have been recovered from the top of TV set outside in the hall.

Notwithstanding the above, I addressed myself the question as to whether the above finding, viewed objectively, could have the effect of raising a reasonable doubt on the vital prosecution case of possession of the drug in question. I considered the use of latches in regard to the door of the bathroom, in relation to the main door to the accused's room, so that one could use the latch to lock a door instead of using and turning the key in the key-hole to lock it. I considered the evidence of Insp. Mudasir and the accompanying two other members of the police party, about Insp. Mudasir knocking the door of the locked room, about the accused opening it; and above all, the incriminating exhibits were all admittedly found in his room. The smallness of the room, the absence of all furniture except the mattress and pillow, the length of time during which the accused was in the room, i.e. the accused's return to the room at 1.00 a.m. that early morning and the arrest at about 10.00 a.m. later, all made it quite impossible for the accused not to have noticed the exhibits, short of the evidence of a black-out or power failure at the material times. At the end of the day, the defence had still not raised such a reasonable doubt as to be entitled to it to result in an acquittal.

I therefore found the accused guilty as charged and convicted him, sentencing him to death by hanging as prescribed.

Also found at [1987] 1 CLJ 408